

No. **21-5475**

IN THE
SUPREME COURT OF THE UNITED STATES

DERRICK JEROME SPENCER - PETITIONER

VS.

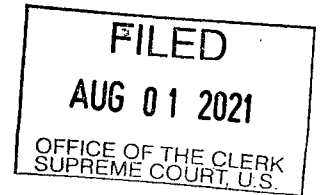
UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ORIGINAL



Derrick Jerome Spencer
#14779-041
Federal Prison Camp
P.O. Box 1000
Duluth MN 55814

Exhibit B

QUESTION PRESENTED

1. Whether Petitioner is being deprived of his civil right to due process of law against law (without due process of law) in violation of the Fifth Amendment and Section 404 of the First Step Act.
2. Whether Section 404 of the First Step Act authorizes a "full resentencing" entitled to Due Process Protection.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

RELATED CASES

United States v Derrick Jerome Spencer, 07-cr-174-JRT-JJG, U.S. District Court of Minnesota. Judgment entered 7/26/19

United States v. Derrick Jerome Spencer, No. 19-2691, United States Court of Appeals for the Eighth Circuit. Judgment entered 5/27/21

TABLE OF CONTENTS

Opinions below	1
Jurisdiction	2
Constitutional & Statutory Provisions Involved	3
Statement of the Case	4
Reasons for granting the writ	5
Conclusion	10

INDEX TO APPENDICES

Appendix A - Decisions of the Appellate Court
Appendix B - Decisions of the District Court

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Apprendi v New Jersey 530 U.S. 466, 147, L. Ed. 2d
435, 120 S. Ct. 2348 (2000)

8

Poe v Ullman, 367 U.S. 497, 6 L. Ed. 2d 989 (1961)

9

STATUTES AND RULES

Section 404 of the First Step Act of 2018

5,6

Federal Rules of Criminal Procedure, Rule 32

9

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

☒ is published.

The opinion of the United States District Court appears at Appendix B to the petition and is

☒ is published

JURISDICTION

[x] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was 5/27/21.

[x] No petition for rehearing was timely filed in petitioner's case.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Judgment was entered 5/27/21

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause, Fifth Amendment; No person shall be deprived of life, liberty, or property without due process of law.

Section 404 of the First Step Act of 2018

STATEMENT OF THE CASE

1. On December 21, 2018, the First Step Act of 2018 was enacted.
2. Section 404 of the First Step Act (FSA) directs a court that imposed a sentence for a crack cocaine offense in violation of 21 U.S.C. §841(b)(1) prior to August 3, 2010, to resentence a defendant in accordance with the modification of the statute, on a motion of the defendant.
3. Petitioner was convicted of, and sentenced to conspiracy to distribute crack cocaine in violation of 21 U.S.C. §841(a)(1)(b)(1)(A), and §846, prior to August 3, 2010.

REASONS FOR GRANTING THE PETITION

The Fifth Amendment provides in relevant part:

No person shall be deprived of liberty without due process of law.

This provision stands that no person can be deprived of any of the (civil rights) individual rights of personal liberty guaranteed by the United States Constitution.

The First Step Act, S 756, was enacted on December 21, 2018. It provides:

a) DEFINITION OF COVERED OFFENSE - In this section, the term "Covered Offense" means the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 stat. 2372) that was committed before August 3, 2010.

b) DEFENDANT'S PREVIOUSLY SENTENCED - A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

c) LIMITATIONS - No court shall entertain a motion made in this section to reduce a sentence if the sentence was previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of the enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

Section 404 mandates a court upon a motion of a defendant to impose a sentence applicable to the changes made from the 100:1 ratio to the 18:1 ratio in regard to sentences involving crack cocaine. Section 2 of the Fair Sentencing Act of 2010 (hereafter FSA 2010) reduced the penalties for offenses involving cocaine base or crack cocaine by increasing the threshold amounts of crack needed to trigger mandatory minimum sentences under §841(b)(1).

After the statutes effective date of August 3, 2010, the amount of crack necessary to trigger the 5 to 40 year imprisonment range under 21 U.S.C. §841(b)(1)(B) increased from 5 grams to 28 grams. Likewise, the quantity of crack needed to trigger the 10 years to life imprisonment range under 21 U.S.C. §841(b)(1)(A) increased from 50 grams to 280 grams.

As long as the offense committed prior to August 3, 2010 involves the modified sections of the Statute in which 5 grams of crack increased to 28, and 50 grams of crack increased to 280, a defendant is covered by this section. See 404(a) (DEFINITION OF COVERED OFFENSE).

And a court has a mandatory duty to establish a reduced sentence for the modified sections of the Statute, as long as the sentence includes a covered offense. In other words, if a sentence includes a conviction of 5 grams or more of crack or 50 grams or more of crack, the court must not look beyond those modified sections of the statute while applying a reduced sentence.

The court must specifically "resentence" a defendant using only the modified "crack" sections of the Statute. Those sections that have been increased to 28 grams or more and 280 grams or more. See 404(b). "A court that imposed a sentence for a covered offense "must" impose a reduced sentence as if".

Congress intent is to eliminate unconstitutional sentences of defendants still serving time for harsh penalties of crack cocaine prior to FSA 2010, and replace them with a sentence prescribed by law as it stands today "without Government interference."

This is understood by mandatory language used in 404(b). The words "may" (must shall, is required to) and "impose" (establish, apply as mandatory) are used to compel a court to create a sentence in accordance with Sections 2 and 3 of FSA 2010.

~~Footnote: The word "may" has been found to be synonymous with shall by many courts. See Black's Law Dictionary at "may".~~

This understanding is reiterated by Congress restricting relief only to those that previously benefited from FSA 2010 and those denied a motion after complete review of it on the merits. See 404(c). See also (c) at, nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

By this language, Congress prevented the government from advocating for a reduction of a defendant's original sentence.

Here, the petitioner was convicted of and sentenced to 50 grams or more of crack cocaine in violation of 21 U.S.C. §§841(a)(1)(b)(1)(A) and 846 prior to August 3, 2010. In accordance with the modified sections of 21 U.S.C. §841(A)&(B), the petitioner's statutory penalties are no longer 10 years to life imprisonment but only 5 years to 40 years. Furthermore, under the new crack cocaine guidelines, 50 grams or more of crack cocaine which is at least 28 but less than 112 grams of crack cocaine activate base offense level 24 as opposed to the base offense level 30, for at least 50 grams of crack cocaine but less than 150 grams, prior to 2010.

Petitioner falls into criminal history category I., which calls for a sentence range of 51 to 63 months under the sentencing guidelines. In the 5 to 40 year sentence range, any amount of time beyond 63 months would violate this Court's holding in *Apprendi v. New Jersey* 530 U.S. 466, 147, 1. Ed. 2d 435, 120 S. Ct. 2348 (2000)("Prescribed Statutory Maximum").

Section 404 of the First Step Act authorizes a "full resentencing" for all defendants with a covered offense under this section.

This resentencing is protected by the Due Process Clause, Rule 32 of the Federal Rules of Criminal Procedure establish sentencing procedure.

As the Honorable Justice Harlan wrote, dissenting in *Poe v Ullman*, 367 U.S. 497, 551-552, 81 S. Ct. 1752, 1781 6 L. Ed. 2d 989 (1961):

"The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."

Spencer (petitioner,) humbly requests expeditious determination of the instant petition because he is under current law entitled to immediate release because he has served years of imprisonment beyond the time authorized by the modified sections of 21 U.S.C. §841(b)(1)A)&(B) and is being deprived of his civil right to due process of the law against law (without due process of law) in violation of the Fifth Amendment and Section 404 of the First Step Act.

CONCLUSION

In accordance with due process of law, the Petitioner is entitled to resentencing under Section 404 of the First Step act of 2018. The Petition for Writ of Certiorari should be granted.

Derrick Jerome Spencer submits this Petition for Writ of Certiorari on this

1st of August, 2021.

Respectfully Submitted,

Derrick Spencer (Date 8 / 1 / 2021)

Derrick Jerome Spencer, Petitioner